

**IN THE  
SUPREME COURT OF MISSOURI**

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**No. 85225**

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**THOMAS G. (JERRY) THOMPSON, et al.  
Appellants,**

**v.**

**CLARK HUNTER, MORGAN COUNTY COLLECTOR, et al.,  
Respondents.**

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**On Petition for Review from the  
Morgan County Court, 26<sup>th</sup> Judicial District  
Honorable Mary Dickerson**

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**BRIEF OF AMICI CURIAE  
MISSOURI COUNCIL OF SCHOOL ADMINISTRATORS  
AND MISSOURI SCHOOL BOARDS ASSOCIATION**

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**Respectfully submitted,**

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## **INTEREST OF AMICI CURIAE**

### **I. Missouri Council of School Administrators**

The Missouri Council of School Administrators (MCSA) is the umbrella organization for the Missouri Association of School Administrators (MASA), which represents approximately 500 school superintendents, and the Missouri Association of Elementary School Principals (MAESP), which represents approximately 900 elementary and secondary school principals. MASA and MAESP members serve as school district and building administrators with primary responsibility for oversight and supervision of our public schools, including development and implementation of school district budgets. Specifically, superintendents complete the levy calculations that are at issue before the Court. School administrators have a direct interest in, and responsibility for, the financial conditions of our school districts. MCSA is the voice of these administrators and should be heard by this Court.

### **II. Missouri School Boards' Association**

The Missouri School Boards' Association (MSBA) is a nonprofit private association of school board members in the state of Missouri. The stated mission of MSBA is advancing excellence in public education through school board leadership. Almost seventy-five percent of public school districts in this state are members of MSBA and support that mission. MSBA, as an educational leader, speaks for its members and all public schools to secure and protect adequate levels of funding for the benefit of Missouri school children.

## **ISSUES PRESENTED**

1. Whether Appellants' are barred from seeking judicial remedies under Article X, §22 of the Missouri Constitution due to their failure to state a claim and failure to timely comply with applicable tax refund provisions?
2. Whether Article X, § 11(b), as amended by a vote of the people in 1998, authorizes school districts to utilize tax rate levies of up to \$2.75 per \$100 assessed valuation without a vote of the people?

## ARGUMENT

**I. THE TRIAL COURT DID NOT ERR IN DISMISSING APPELLANT'S PETITION BECAUSE IT WAS PROPER TO DISMISS A DECLARATORY JUDGMENT FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF COULD BE GRANTED IN THAT DECLARATORY JUDGMENT WAS NOT AN APPROPRIATE REMEDY AND A LAWSUIT CHALLENGING THE TAX IN QUESTION MUST BE BROUGHT BEFORE THE TAX IS DUE AND PAYABLE AND APPELLANTS DID NOT BRING THEIR DECLARATORY JUDGMENT ACTIONS BEFORE THE TAX WAS DUE AND PAYABLE.**

**A. Declaratory Judgment was Not an Appropriate Remedy**

The declaratory judgment action filed by Appellants did not present an enforceable action to the trial court and was properly dismissed. This Court has already spoken to the issue of enforcement of Mo. Const. art. X, § 22(a):

First, taxpayers may seek an injunction to enjoin the collection of a tax until its constitutionality is finally determined. Second, if a political subdivision increases a tax in violation of article x, section 22(a) and collects the tax . . . the constitutional right established in article x, section 22(20 may be enforced only by a timely action to seek a refund of the amount of the unconstitutionally imposed increase.

*Ring v Metropolitan St. Louis School District*, 969 S.W.2d 716, 718-19 (Mo. banc 1998).

Rather than an injunction to enjoin collection of the tax, Appellants sought declaratory

judgment regarding the interplay of art. X, § 11(b) (“Amendment 2”)<sup>1</sup> and art. x, § 22(a) (“Hancock amendment”)<sup>2</sup> on three counts. Appellants asked for declaratory judgment as to whether Amendment 2 authorizes levy increases up to \$2.75 without a vote of the people (Count I), whether Amendment 2 negates the application of the Hancock amendment when valuation growth exceeds inflation growth (Count II), and whether Chapter 163, RSMo requires a loss or reduction of state aid when Hancock triggers a levy reduction (Count III). Although Appellants also initiated a statutory action for a refund of taxes paid under protest pursuant to §139.031, RSMo,<sup>3</sup> they did not seek an injunction to enjoin collection of the taxes as required by *Ring*. Instead, Appellants attempted to substitute declaratory judgment.

An injunction, rather than declaratory judgment, is the appropriate mechanism for enforcing the application of art. X, § 22(a) because an injunction is enforceable through a contempt citation (§526.220, RSMo) and additional litigation is clearly contemplated when issues in a declaratory judgment proceeding have been completed. *Farley v. Missouri Department of Natural Resources*, 592 S.W.2d 539, 541 (Mo.App. 1979). *See also* §527.080, RSMo. Judicial and fiscal economy are always important, but when one or more of the litigants must expend public funds to pursue the litigation, the fiscal efficiency of the injunction is even more important.

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<sup>1</sup> The terms “art. X, §11(b)”, “§11(b)” and “Amendment 2” are used interchangeably to refer to Mo. Const. art. X, §11(b).

<sup>2</sup> The terms “art. X, §22(a)”, “§22(a)” and “Hancock amendment” are used interchangeably to refer to Mo. Const. art. X, §22(a).

<sup>3</sup> Citations to the Missouri Revised Statutes (RSMo) refer to the 2000 edition unless otherwise noted.

*Koehr v. Emmons*, 55 S.W.3d 859 (Mo.App. E.D. 2001), presented a case similar to this one. Plaintiffs sought both declaratory judgment and a refund of taxes allegedly levied in violation of art. X, § 22(a). The court in *Koehr* held that, other than §139.031, RSMo, the only way to enforce the Hancock amendment is to bring an action to enjoin the collection of taxes before they are due. In this case, Appellants did not seek an injunction and their petition was properly dismissed for failure to state a claim.

Although the trial court dismissed Appellant's request for declaratory judgment in Counts I, II, and III for failure to state a claim *because the request for declaratory judgment was not timely filed*, this court should affirm that dismissal because declaratory judgment was not a claim for which relief could be granted because it was not an injunction as required by *Ring*. An appellate court should affirm a dismissal if any ground supports the motion to dismiss regardless of whether the trial court articulated or relied on the reason. *City of Chesterfield v. Deshelter Homes*, 938 S.W.2d 671, 672 (Mo.App. E.D. 1997)

## **B. Declaratory Judgment Was Not Timely Filed**

If this Court finds that declaratory judgment is an appropriate mechanism for enforcement of the Hancock amendment, it must also find that, in this case, the declaratory judgment action was not timely. Pursuant to this Court's holding in *Ring*, taxpayers may enforce the provisions of art. X, § 22(a) only by seeking to enjoin collection of taxes or by timely filing for a refund of taxes. *Ring* at 718-19. To prevent the collection of taxes, action must necessarily be taken prior to their collection. Appellants in this case sought declaratory judgment regarding the propriety of taxes collected only after those taxes became due and payable. Therefore, if this court accepts

that declaratory judgment rather than injunction was a claim for which relief could be granted, the declaratory judgment must have been filed in a timely manner *so that it would have the same general effect of an injunction*. In this case, had Appellants been successful in obtaining a declaratory judgment that Hancock did not permit a levy of \$2.75 without a vote of school district patrons prior to the taxes becoming due and payable, the effect would have been similar to that of an injunction and the school district would not have collected the taxes. However, Appellants filed their petition for declaratory judgment only after the taxes became due and payable so that there was no opportunity to prevent the collection of the levied tax.

School districts are dependent on predictable tax revenue. By statute, school districts must establish a budget annually. Section 67.010, RSMo. *See also* §164.011, RSMo. School districts also operate primarily on a cash basis and carry few reserves. In his concurrence in *Green v. Lebanon R-III School District*, 13 S.W.3d 278 (Mo. banc 2000), Judge Wolff explained the importance of a timely filing when matters of tax rates and school districts are involved:

To require a timely challenge to the tax rate, before the taxes under the rate are due, is the only interpretation consistent with the role of school district tax levy rates with respect to school district financing. The state's foundation aid formula, section 163.031.6, bases the amount of state aid that a district receives upon the school district's tax rate, specifically that component of the rate that is the "operating levy for school purposes." Thus, the tax rate used by the state in calculating state aid is the levy rate used for the prior year's property

tax assessments; i.e., the rate that took effect December 31 when taxes were due.

*Id.* at 288 (Wolff, M. concurring).

In addition to the effect on state aid, timelines is also crucial in providing school districts with the notice of potential revenue loss.

A timely challenge to the rate, even though not fully adjudicated before the end of the calendar year, would at least provide notice to the school districts and allow them to prepare for what could be an otherwise crushing financial blow. A timely challenge would provide notice at least six months before a districts tax rate is used in the calculation of state aid under the formula in section 163.031, which operates on the state's July 1 to June 30 fiscal year. This timing may also make possible a judicial decision on the district's tax rate, or a voluntary revision of that rate, prior to its use in the state aid formula.

*Id.* at 289. Pointing to the court of appeals decision, Appellants claim that a requiring a declaratory judgment action be filed by December 31 when a §139.031, RSMo action for refund of taxes need not be filed until 90 days after paying the taxes under protest would be absurd. *Thompson v. Hunter*, WD 61742 (Mo.App. W.D. 2003). (*See also* Appellant's Initial Brief p. 29). Appellants overlook significant distinctions between paying taxes under protest and requesting an injunction or declaratory judgment. First, there is a significant difference in the amount of money at issue. Under the scheme of §139.031,

RSMo, only those taxes paid under protest will be diverted from school use. However, a successful declaratory judgment action would impact all taxes paid. School districts are also provided notice when any taxpayer pays taxes under protest and these taxes are specially accounted for as the district sets its budget for the coming year. Sections 163.031 & 139.031, RSMo. However, the only “notice” in an injunctive or declaratory judgment action is the filing of the suit. It is not absurd, indeed it is quite rational to require taxpayers to file a challenge to the tax rate set by the district prior to those taxes being due and payable while at the same time permitting the recovery of taxes paid under protest according to a proscribed statutory scheme. As noted by Judge Wolff previously, “[t]o require timely challenge to the tax rate, before the taxes under the rate are due, is the only interpretation consistent with the role of the school district tax levy rates with respect to school district financing.” *Green* at 288. (Wolff, M. concurring).

**II. THE TRIAL COURT DID NOT ERR IN DISMISSING APPELLANTS' PETITION BECAUSE APPELLANTS' FAILED TO STATE A CLAIM UPON WHICH RELIEF COULD BE GRANTED IN THAT SCHOOL DISTRICTS ARE AUTHORIZED BY ARTICLE X, SECTION 11 OF THE MISSOURI CONSTITUTION TO UTILIZE A TAX RATE LEVY OF \$2.75.**

Should the Court find that Appellants timely stated a cause of action, with which amici curiae disagree, the central question before this Court is whether Mo. Const. art. X, § 11(b), as amended by a vote of the people in 1998, authorizes school districts to utilize a tax rate levy of \$2.75 without prior voter approval. The clear language of art. X, §11(b) provides school districts this authority. Thus, school districts must be allowed to maintain their levies at the \$2.75 rate or adjust their levies to the \$2.75 rate without voter approval. To hold otherwise would disregard the clear language of §11(b), disregard the intent of §11(b), and place at least 111 school districts in a precarious legal and financial situation at a time when school districts cannot afford to be saddled with additional financial burdens.

Mo. Const. art. X, §11(b), amended in 1998, sets forth the maximum levy that school districts can impose *without voter approval*. The sections read in part:

Any tax imposed upon such property *by . . . school districts*, . . . shall not exceed the following annual rates: . . . For school districts formed of cities and towns, including the school district of the city of St. Louis – *two dollars and seventy-fives cents on the hundred dollars assessed valuation*; . . .

[Emphasis added.] *Green v. Lebanon R-III Sch. Dist.*, 13 S.W.3d 278, 284 (Mo. banc 2000). *Tannenbaum v. City of Richmond Heights*, 704 S.W.2d 227, 228 (Mo. banc 1986), wherein the Court noted the maximum tax rate of \$1.00 per \$100 assessed valuation as authorized without voter approval. On its face, §11(b) authorizes school districts to take maintain or set levies at the \$2.75 rate by decision of the school board. Given the clear authority granted by §11(b), Appellants' claims to the contrary must fail.

**A. Interpretation of Conflicting Constitutional Provisions**

Appellants claim that art. X, § 22 trumps art. X, § 11(b), ignoring that §11(b) was adopted by a vote of the people fourteen years after §22(a) was adopted. Certainly, the vote later in time most accurately reflects the will of the people to allow school districts to adopt levies of up to \$2.75 by decision of the school board.

This Court has recognized that in construction of constitutional provisions it should undertake to ascribe to words the meaning which the people understood them to have when the provision was adopted.

*State ex inf. of Danforth v. Cason*, 507 S.W.2d 405, 408 (Mo. banc 1983); *Citing State ex Rel. Heimberger v. Bd. of Curators of Univ. of Mo.*, 188 S.W. 128 (Mo. banc 1916).

. . . The framers of the Constitution and the people who adopted it 'must be understood to have employed words in their natural sense, and to have intended what they have said.'

This is but saying that no forced or unnatural construction is to be put upon their language.

*Danforth* at 409. [Citations omitted.]

The intent of the people is not only demonstrated by approval of a constitutional amendment in 1998, it is also demonstrated by the ballot title itself. This title was placed before the people for approval which provided clear notice of the purpose of the amendment:

School board may set operating levy no higher than \$2.75  
without a vote. Voter approval by simple majority required to  
set levy up to \$6.00. Voter approval by two-thirds required to  
set levy above \$6.00:

*See Appendix A – Ballot Title Language for Proposition No. 2 at A- 1.*

The passage of the Outstanding School Act of 1993 required that school districts adopt levies of \$2.75. Amendments to §163.021, RSMo, continued to promote the use of a \$2.75 levy by conditioning the availability of additional state aid on the use of such levy. Amendment 2 followed, authorizing school districts to utilize a \$2.75 levy without voter approval. All of this occurred several years after art. X, §22(a) was adopted.

The foundation formula is designed to reward the investment of additional local monies by providing additional state monies to school districts. Lowering school district levies as Appellants propose will lower the total state aid available to school districts through the formula. Mo. Const. art. X, §22 was designed to be revenue neutral, but it was not designed to make the foundation program neutral. The lower the local tax rate, the lower the state aid available to school districts. Thus, adopting Appellants' contentions negatively impact school districts' financial status and lowers total available state aid. In addition, adopting Appellants' contentions results in losses far greater than the \$27.6 million referenced in the amicus brief of David C. Humphrey's and Tamko

Roofing Products, Inc. School districts will be subjected to extensive litigation that was unforeseeable when the levies were set, including significant attorneys fees and costs. Should Appellants prevail, school districts will likely be forced to make additional cuts to programs, services and staff to pay both the litigation costs and the alleged overages. All of this on the heels of state budget cuts and withholdings totaling approximately \$333 million to elementary and secondary education. Few school districts can absorb additional significant losses in revenue and aid.

In addition to the clear language and intent of art. X, §11(b), this Court and the State Auditor have noted the authority granted various taxing authorities under §11(b). *See Tannenbaum v. City of Richmond Heights*, 704 S.W. 2d at 228; *See also Three Rivers Junior College Dist. of Poplar Bluff v. Statler et. al*, 421 S.W.2d 235 (Mo. banc 1967). The State Auditor noted the constitutional grant of authority in the *Review of 2002 Property Tax Rate*, Report No. 2002-123 at page 5 where she states:

The 111 schools listed in *Appendix IX* increased taxes and revenues by \$27,669,024 without voter approval by utilizing the Constitutional Amendment No. 2 approved by the voters on November 3, 1998, which allows school districts to levy a minimum of \$2.7500, per \$100 of assessed valuation, by school vote.

Appendix B – State Auditor Claire McCaskill, *Review of 2002 Property Tax Rate*, Report No. 2002-123 at B-8.

Appellants' claim that art. X, §22 trumps art. X, §11(b) creates a direct conflict between these two constitutional provisions. When two constitutional provisions are

found to be in conflict, the later in time prevails as it is the most recent expression of the will of the people. *State ex rel. McKittrick v. Bode*, 113 S.W.2d 805, 808 (Mo. banc 1938). Thus, when resolving the conflict between §22 and §11(b), §11(b) prevails. School districts are authorized to utilize the \$2.75 levy without first obtaining voter approval and without rolling back the \$2.75 levy. Mo. Const. art. X, §11(b) clearly and unambiguously expresses the will of the people. Thus, the opportunity to harmonize the two constitutional provisions is not available, and the Court is without ability to resort to interpolation. *McKittrick*. at 808-09.

Amendments . . . are usually adopted for the express purpose of making changes in the existing system. Hence it is very likely that conflict may arise between an amendment and portions of a Constitution adopted at an earlier time. In such a case the rule is firmly established that an amendment duly adopted is part of the Constitution and is to be construed accordingly. . . . If there is a real inconsistency, the amendment must prevail because it is the latest expression of the will of the people. In such a case there is no room for the application of the rule as to harmonizing inconsistent provisions.

*Id.* at 800-09.

The direct conflict is whether school districts must submit a levy of \$2.75 to a vote of the people if the levy is higher than the current voter approved levy or must rollback their levy below \$2.75 due to increases in assessed valuations, or whether art. X, §11(b)

prevails and school districts are authorized to utilize a levy of \$2.75 by decision of the school board. Under §22 the public votes. Under §11(b) the school board votes. These two provisions are in direct conflict. Thus, the later in time prevails. Voters relinquished the right to vote on levy increases up to the \$2.75 limit when they amended §11(b) in 1998. Appellants' claims to the contrary must fail.

Should the Court determine that art. X, §11(b) and §22 are not in conflict, with which amici curiae disagree, the Court should consider that school districts have relied upon the \$2.75 levy authorization since its enactment. Although the task of calculating the proper levy rate is complex and confusing, Respondent Morgan County School District clearly articulates the proper method of calculation in their brief filed in Green I which we understand to be included in the Appendix to Respondent's reply brief being filed with this Court. Careful consideration must be given to the levy that school districts *could* have imposed in the prior year, not what school districts actually levied in the prior year. To change the method of calculation mid-stream would not only be fundamentally unfair to school districts but would leave school districts in a precarious situation without adequate resources. Appellants' new interpretation, five years after art. X, § 11(b) was amended, would cause unnecessary turmoil and hardship.

To reconcile the plain language of art. X, §11(b) with the language of §22 requires consideration of current school district practices and procedures which appropriately resolve the issues raised by Appellants. Therefore, Appellants' request that the Court create a new, more favorable, method of calculation must be denied.

## CONCLUSION

The Court should reject Appellants' claims as untimely and for failure to state a justiciable claim. Should the Court reach the merits of Appellants' claims, the Court should uphold the application of Mo. Const. art. X, §11(b), thus determining that art. X, §11(b) authorizes school districts to utilize tax rate levies of \$2.75 without a vote of the people.

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## **CERTIFICATE OF SERVICE**

I hereby certify that true and accurate copies of the foregoing brief and a disk containing a copy of the brief were mailed, postage prepared, on this 30th day of July, 2003, to Alex Bartlett, 235 East High Street, P.O. Box 1251, Jefferson City, Missouri 65102; Marvin W. Opie, Morgan County Prosecuting Attorney, 101 East Newton, Versailles, Missouri 65804; Todd S. Jones, Assistant Attorney General, P.O. Box 899, Jefferson City, Missouri 65102; Craig S. Johnson, The Col. Darwin Marmaduke House, 700 E. Capitol Ave., P.O. Box 1438, Jefferson City, Missouri 65102; John Dods, One Kansas City Place, 100 Main Street, Kansas City, Missouri 64105; and Ann Covington, One Metropolitan Square, 211 N. Broadway, Suite 3600, St. Louis, Missouri 63102.

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## **COMPLIANCE WITH RULE 84.06**

I hereby certify that the Brief of Amici Curiae Missouri Council of School Administrators and Missouri School Boards Association contains the information required by Supreme Court Rule 55.04, complies with Rule 84.06, and contains 4,090 words. I further certify that the accompanying disk has been scanned for viruses and is virus-free.

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Attorney at Law

## **APPENDIX**

Appendix A – Ballot Title Language for Proposition No. 2

Appendix B – State Auditor Claire McCaskill, *Review of 2002 Property Tax Rate*, Report No. 2002-123